U.S. Senate
Republican Policy
Committee

Legislative Notice

Jon Kyl, Chairman

No. 36 September 11, 2003

S.J.Res. 17 – A Joint Resolution Disapproving the Rule Submitted by the FCC With Respect to Broadcast Media Ownership

Calendar No. 269

Pursuant to 5 U.S.C. 802(c), S.J.Res. 17 was discharged from the Senate Committee on Commerce, Science, and Transportation on September 3, 2003, and placed on the Senate Calendar; no written report.

NOTEWORTHY

- By unanimous consent, the Senate will proceed to the consideration of S.J.Res. 17 today at 1 p.m. for three hours of debate only, with all other statutory limitations (governed by the Congressional Review Act) remaining in order. The Senate will then return to S.J.Res. 17 on Monday at 4:30 p.m. for 60 minutes of debate, followed by a third reading and a vote on final passage. No amendments are in order. [See p. 4 for more details on procedure.]

- In response to a congressional mandate to review its media ownership rules every two years, the Federal Communications Commission (FCC) on June 2, 2003, voted 3-2 to set new limits on media concentration. After reviewing six media ownership rules, the FCC loosened four, strengthened one, and left another unchanged. [See details on pp. 2-4.]

- This bill is a resolution of disapproval of the FCC's media ownership rules, which would excise them from the *Federal Register* and deem them invalid. The authority for such action is contained in the Congressional Review Act, which was part of the Contract with America Advancement Act of 1996 (SBRFA) (P.L. 104-121). The Act allows Congress to review and veto (with the signature of the President or two-thirds majority of both Houses) many federal agency regulations with an economic effect greater than $100 million.

- This procedure has been used only once, to repeal an Occupational Safety and Health Administration (OSHA) ergonomics rule, ERGO Repeal Resolution (P.L.107-5), at the beginning of the 107th Congress in March 2001. However, while the ERGO repeal was enacted, the President's senior advisors recommend a veto of S.J.Res. 17.

HIGHLIGHTS

NOTE: Last week, the 3rd Circuit Court of Appeals issued an emergency stay to stop the implementation of the new rules, which were scheduled to take effect September 4, 2003.

On July 2, 2003, the FCC issued its final *Report & Order* on its 2002 Biennial Review of the Commission's Broadcast Ownership Rules (FCC 03-127). This review was mandated by Section 202 of the Telecommunications Act of 1996 (P.L. 104-104), which requires the FCC to review its ownership rules every two years and "repeal or modify any regulation it determines to be no longer in the public interest as a result of competition." The *Report & Order* reviewed six rules:

- **Dual Network Ownership Prohibition:** (*originally adopted 1946*) – the FCC retained its ban on mergers among any of the top four national broadcast networks. This rule prevents a merger between NBC, CBS, ABC, or FOX.

- **National TV Ownership Limit:** (*originally adopted in 1941*) – the FCC incrementally increased the 35-percent limit to a 45-percent limit on national ownership.
    - A company can own TV stations reaching no more than a 45-percent share of U.S. TV households.
    - The share of U.S. TV households is calculated by adding the number of TV households in each market in which the company owns a station. Regardless of the station's ratings, it is counted for all of the potential viewers in the market. Therefore, a 45-percent share of U.S. TV households <u>is not equal</u> to a 45-percent share of TV stations in the United States.
    - On March 31, 2003, there were 1,340 commercial TV stations in the U.S. Of these 1,340 stations, Viacom owns 39 TV stations (2.9 percent), Fox owns 37 (2.8 percent), NBC owns 29 (2.2 percent) and ABC owns 10 (0.8 percent).

- **Local Radio Ownership Limit:** (*originally adopted in 1941*) – the FCC found that the current limits on local radio ownership continue to be necessary in the public interest, but determined that the previous methodology for defining a radio market did not serve the public interest. The FCC therefore tightened its market definition to prevent further concentration in local radio markets. The radio caps remain at the following levels:

    - In markets with 45 or more radio stations, a company may own 8 stations, only 5 of which may be in one class, AM or FM.
    - In markets with 30-44 radio stations, a company may own 7 stations, only 4 of which may be in one class, AM or FM.
    - In markets with 15-29 radio stations, a company may own 6 stations, only 4 of which may be in one class, AM or FM.

- In markets with 14 or fewer radio stations, a company may own 5 stations, only 3 of which may be in one class, AM or FM.

- **Local TV Multiple Ownership Limit:** (*originally adopted in 1964*) - the FCC relaxed the rule as follows:
  - In markets with five or more TV stations, a company may own 2 stations, but only one of these stations can be among the top four in ratings.
  - In markets with 18 or more TV stations, a company can own 3 TV stations, but only one of these stations can be among the top four in ratings.
  - In deciding how many stations are in the market, both commercial and non-commercial TV stations are counted.
  - The FCC adopted a waiver process for markets with 11 or fewer TV stations in which 2 top-four stations seek to merge. The FCC will evaluate on a case-by-case basis whether such stations would better serve their local communities together rather than separately.

- **Radio and TV Transferability Limited to Small Businesses:** the FCC's new TV and radio ownership rules may result in a number of situations where current ownership arrangements exceed ownership limits. The FCC grandfathered owners of those clusters, but generally prohibited the sale of such above-cap clusters. The FCC made a limited exception to permit sales of grandfathered combinations to small businesses as defined in the release that accompanied the *Order*.

- **Cross-Media Limits:** this rule replaces the broadcast-newspaper and the radio-television cross-ownership rules and establishes a Diversity Index to provide guidance on permissible media combinations. The new rule states:
  - In markets with 3 or fewer TV stations, no cross-ownership is permitted among TV, radio and newspapers. A company may obtain a waiver of that ban if it can show that the television station does not serve the area served by the cross-owned property (i.e., the radio station or the newspaper).
  - In markets with between 4 and 8 TV stations, combinations are limited to <u>one</u> of the following:

    (A) A daily newspaper; one TV station; and up to half of the radio station limit for that market (i.e., if the radio limit in the market is 6, the company can only own 3) **OR**

    (B) A daily newspaper; and up to the radio station limit for that market; (i.e., no TV stations) **OR**

    (C) 2 TV stations (if permissible under local TV ownership rule); up to the radio station limit for that market (i.e., no daily newspapers).
  - In markets with 9 or more TV stations, the FCC eliminated the newspaper-broadcast cross-ownership ban and the television-radio cross-ownership ban.

BACKGROUND

<u>Procedure as Governed Under the Congressional Review Act (CRA)</u>

What is commonly referred to as the "Congressional Review Act" (CRA), was enacted into law as Subtitle E of Title II of the Contract with America Advancement Act of 1996. Intended to allow Congress and the President to veto regulations with an economic impact of greater than $100 million that Congress finds unnecessary or economically harmful, the procedure has been used only once – to repeal an Occupational Safety and Health Administration (OSHA) ergonomics rule, ERGO Repeal Resolution (P.L. 107-5), in March of 2001. The ergonomics rule was invalidated once the President signed the resolution of disapproval into law.

Under the CRA rules in the Senate:

> Once a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of . . . . The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order.
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> Debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.
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> Immediately following the conclusion of the debate on the joint resolution and a single quorum call at the conclusion of the debate (if requested in accordance with the rules of the Senate), the vote on final passage of the joint resolution shall occur.

<u>Possible Procedural Problems</u>

If both Houses of Congress were to pass this resolution of disapproval and it were signed into law by the President, the rules in the FCC *Report & Order* would not take effect. Also, if this resolution were signed into law, paragraph (a)(5) of Section 801 of the CRA states that the [FCC's] rule[s] "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."

This provision could prove problematic for the National Television Ownership Rule in particular. In *Fox v. FCC*, which was decided in February 2002, the D.C. Circuit Court of Appeals vacated and remanded the 35-percent cap on national station ownership to the Commission for further review. The court said that the FCC's action was "arbitrary and capricious and contrary to law" because it "failed to give an adequate reason for its decision" to keep the 35-percent cap. Moreover, the court argued, the Commission "provided no analysis of the state of competition in the television industry to justify its decision to retain the national ownership cap."

In remanding the decision, the court allowed the FCC to provide reasons, "either analytical or empirical," to justify a continuation of the rule. Over 20 months, the Commission received over 800,000 public comments, conducted numerous field hearings, and commissioned 12 *Media Ownership Working Group Studies* (empirical analyses prepared by FCC staff and independent academics) to analyze the nature of competition in the industry and justify the rule. After undergoing such an extensive review and comment period, a majority of commissioners judged that only a 45-percent cap could be justified.

Thus, if the resolution of disapproval became law, the FCC would shortly thereafter have to begin drafting new rules to meet the demands of the Court in *Fox*. Additionally, the FCC still will have to meet the statutory deadline set forth in 202(h) of the Act and issue its 2004 Biennial review media ownership rules without guidance from Congress. But given the extensive analytical and empirical record provided to justify the 45-percent cap, any National TV Ownership Cap set lower than 35 percent could be judged "arbitrary and capricious and contrary to law" because it ignored the analysis of the state of competition in the television industry just completed by the FCC.

Yet, at the same time, a 45-percent rule would not be permissible under paragraph (a)(5) of section 801 for reasons cited above. The courts would be forced to resolve the apparent contradiction in law.

To add another complication, section 804 of the CRA also states:

> (3) The term 'rule' has the meaning given such term in section 551, except that such term does not include–
>
> > (A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, ***corporate or financial structures, reorganizations, mergers, or acquisitions thereof***, or accounting practices or disclosures bearing on any of the foregoing;

Given the fact that the issue of media concentration revolves around questions of "corporate or financial structures, reorganizations, mergers, or acquisitions thereof," it is difficult to see how such rules could be subject to a legislative veto as prescribed by the plain language of the Congressional Review Act.

Whatever the merits of the FCC's rules, a close reading of the relevant provisions of the CRA strongly suggest that use of a legislative veto in this instance would be subject to several lawsuits. In this instance, it might be preferable for Congress to use a different vehicle to address the FCC rules, such as S. 1046, and amend the Telecommunications Act of 1996, or codify the rules in the Communications Act of 1934, instead of using a resolution of disapproval.

BILL PROVISIONS

The one-page joint resolution states:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That Congress disapproves the rule submitted by the Federal Communications Commission relating to broadcast media ownership (Report and Order FCC 03-127, received by Congress on July 10, 2003), and such rule shall have no force or effect.

ADMINISTRATION POSITION

According to the Statement of Administration Policy issued on September 11, 2003, if S.J. Res. 17 were presented to the President, his senior advisors would recommend that he veto it. The Administration believes that the new FCC local and national media ownership rules more accurately reflect the changing media landscape and the current state of network station ownership, while guarding against undue concentration in the marketplace.

POSSIBLE AMENDMENTS

Under the CRA, no amendments are permitted.